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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO STATE INVESTMENT COUNCIL,

Plaintiff-Appellee,

and FRANK FOY, SUZANNE FOY and JOHN CASEY,

Intervenors-Appellants,

v.

GARY BLAND, et al.,

Defendants,

and ELLIOT BROIDY,

Defendant-Appellee.

Santa Fe County
Sarah M. Singleton, District Judge
Case No. D-101-CV-2011-01534
Ct. App. No. 34,042

THE NEW MEXICO STATE INVESTMENT COUNCIL'S ANSWER BRIEF

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PRELIMINARY STATEMENT

This is the third in a series of four similar appeals serially filed by Frank Foy, Suzanne Foy and John Casey (collectively "Appellants" or "Intervenors") challenging settlements the State of New Mexico has entered into in its lawsuit pursuing pay-to-play corruption of the New Mexico State Investment Council's ("NMSIC's") investment process.[1] *See* Court of Appeals No. 33,787 ("First Appeal"); Court of Appeals No. 34,077 ("Second Appeal"); and Court of Appeals No. 34,570 ("Fourth Appeal"). In all of these appeals, Appellants seek to enlist this Court in their misguided effort to divest the State of its authority to prosecute its own legal claims brought by the NMSIC in this lawsuit. However, this appeal differs significantly from the other three. The other three appeals involve situations in which Appellants were given the opportunity to present evidence at a hearing that the settlements were not fair, adequate and reasonable under all of the circumstances. This appeal involves a situation where no fairness hearing was offered, because none was required under NMSA 1978 44-9-6(C) of the New

[1] For purposes of this case, the New Mexico Attorney General's Office ("NMAGO"), on behalf of Attorney General Hector Balderas, commissioned the NMSIC's counsel as Special Assistant Attorneys General working under the authorization of the NMAGO. Accordingly, the rights and powers conferred upon the NMAGO are shared, in this case, with the NMSIC. The State of New Mexico, the NMAGO, and the NMSIC are therefore interchangeably referred to as the "State."

Mexico Fraud Against Taxpayers Act ("FATA"), NMSA 1978 §§ 44-9-1 to 44-9-14.

Here, Appellants challenge the District Court's August 3, 2014 Order ("Dismissal Order") **[RP 6046-6048]**, granting the State's motion for voluntary dismissal of defendant Elliot Broidy ("Broidy") from this action. In return for Broidy's dismissal, the NMSIC received a one million dollar ($1,000,000) settlement payment. **[RP 6020].** In dismissing Broidy, the District Court was simply exercising its discretion under the Rules of Civil Procedure for the District Courts, NMRA 1-041(A)(2), to grant plaintiff NMSIC's request to voluntarily dismiss a defendant. **[RP 6020]** Because Appellants had no right to a hearing, the District Court dismissed Broidy without a hearing. **[RP 6046]**

Appellants carelessly filed nearly the exact same Brief in Chief in this appeal that they filed in their first two appeals. By doing so, Appellants not only raised a host of issues that have nothing to do with this appeal, but also failed to address the decisive issue: standing. The District Court correctly concluded that Appellants lack standing to challenge the State's settlement with Broidy, because Appellants never asserted a claim against Broidy in their own prior *qui tam* suits. Appellant's Brief in Chief does not contain an argument – much less the citation of any authority – that Appellants have standing to object to settlements with parties they never sued and about whose activities they know absolutely nothing – apart

from what the State has uncovered in its investigation and discovery in this case and disclosed to Appellants in discovery.

Appellants' lack of standing is grounded in the District Court's decision on January 18, 2012 to permit Appellants to intervene in this case under Section 44-9-6(H), insofar as claims in this case are "alternate remed[ies]" to claims made by Appellants (Intervenors below) in their prior *qui tam* suits. **[RP 1470-1471]** The District Court subsequently ruled at a July 15, 2013 hearing that Intervenors lacked standing to challenge the State's dismissal of defendant, M. Robert Carr ("Carr"), because Intervenors had not named Carr in their prior FATA suits. **[7-15-13 Tr. 42:18-25, 43:3-8] [RP 4358]** Intervenors did not attempt to appeal that ruling, which is law of the case. The District Court restated this ruling again at a June 19, 2014 hearing. **[6-19-14 Tr. 60:11-16]**

In moving for the voluntary dismissal of Broidy on July 21, 2014, the State argued that the Court's prior rulings on standing applied, and that Intervenors lacked standing to challenge Broidy's dismissal, because they had not named him in their prior *qui tam* suits. **[RP 6021]** The District Court agreed and entered its August 3, 2014 Dismissal Order, **[RP 6046-6048]** holding that Intervenors lacked standing to challenge the State's settlement with and dismissal of Broidy.

Appellants failed to raise the issue of standing in their docketing statement; they failed to make any argument addressing the Court's legal ruling on standing in

their Brief in Chief. Appellants have therefore waived the issue in this appeal. Even without a waiver, however, the law makes clear that Appellants have no standing with respect to a defendant they did not sue in their *qui tam* case. Because standing is a decisive threshold issue, this Court need not reach any other issue in this appeal.

Even assuming they had standing, however, Appellants make the exact same meritless arguments here as they made in their prior appeals. They accuse the District Court of wide-ranging legal errors in approving the Broidy settlement and base their arguments on little more than demagoguery.

Appellants want to undo the State's settlement with respect to Broidy, a party they never sued, even though they admit that they have no personal knowledge of anything Broidy may have done to corrupt the investment process at the NMSIC and are, therefore, unable to provide the State with any genuine, useful information that it lacks. Apparently, if successful, Appellants will seek to add Broidy as a defendant in their now-consolidated action and base their allegations on those contained in the Third Amended Complaint in this action.

The outcome Appellants seek would result in an unconstitutional encroachment on the State's authority over the prosecution of its own legal claims of a magnitude beyond that threatened in the first two appeals. This Court should

soundly reject Appellants' arguments and affirm the well-supported decision of the District Court.

SUMMARY OF PROCEEDINGS

The District Court's February 12, 2014 Findings and Conclusions **[RP 5635-5684]** in support of its initial (March 30, 2014) approval of the first round of settlements in this case (the subject of the First Appeal), set forth a comprehensive account of most of the procedural history leading up to the August 3, 2014 Dismissal Order **[RP 6046-6048]** dismissing Broidy that Appellants (not Defendants, but third-party Intervenors) challenge here. The following summary reflects the District Court's procedural and factual findings that bear most directly on the issues addressed in this Answer Brief. It also incorporates those previous findings and conclusions from the Court's prior approval of the first round of settlements in this case insofar as they "provide the legal frame work for analysis of future proposed settlements."[2] **[RP 5636]**

1. The Underlying Misconduct: Pay-to-Play Corrupts Investments at NMSIC

This case involves a pay-to-play scheme at the NMSIC during former Governor Bill Richardson's ("Richardson") tenure as Chair of the NMSIC. **[RP**

[2] In addition to citations to the record proper, when citing the Findings and Conclusions in this brief counsel will also refer to the numbers of the Findings of Fact ("FOF") or the Conclusions of Law ("COL") sections of the Findings and Conclusions because they are more specific, and presumably more useful, than just page numbers.

5639, FOF 11][3] Broidy, the defendant at issue in this appeal, was founder and Chairman of a California-based venture fund called Markstone Capital Group LLC ("Markstone"). **[RP 2867]** NMSIC alleged that Broidy secured an investment from NMSIC in Markstone's private equity fund by making an undisclosed and illegal *quid pro quo* payment to settling defendant Carr, a friend of Richardson's, thereby aiding other defendants in breaching their fiduciary duties to NMSIC. **[RP 2868]**. NMSIC did not allege – as it did against all of the other settling defendants involved in the four settlements – that Broidy was in any way involved with Anthony or Marc Correra.

*2. **Intervenors' Qui Tam Cases.***

Appellants' intervention in this case stems from their two *qui tam* cases under FATA, broadly alleging fraud and investment-related misconduct at the NMSIC and the New Mexico Educational Retirement Board ("NMERB"). **[RP 5640-5641, FOF 16-17]** Broidy is not a defendant in either of Appellants' *qui tam* actions. **[RP 6021]**

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[3] The District Court's February 12, 2014 Findings of Fact cited herein were binding only as to the first set of settling defendants before the District Court at that time (Daniel Weinstein, Vicky L. Schiff, William Howell and Marvin Rosen). **[RP 5635-6]** For purposes of the instant appeal, these factual recitations are not presented as final conclusive determinations as to any other party, but are instead presented for factual context for the issues presented in the appeal.

The first such case, *State of New Mexico ex rel. Frank C. Foy v. Vanderbilt Capital Advisors, LLC*, No. D-101-CV-2008-1895 ("*Vanderbilt*") claims that Vanderbilt Capital Advisors LLC made false statements to the NMERB and NMSIC regarding investments each fund made in Collateralized Debt Obligations ("CDOs"), but the complaint also asserts general allegations regarding pay-to-play. **[RP 5640, FOF 16].** The 49 defendants named in the *Vanderbilt* complaint, most of whom have never been served, do not include Broidy or his former investment firm, Markstone. **[RP 5640, FOF 16]**

The second *qui tam* case, *State of New Mexico ex rel. Frank C. Foy v. Austin Capital Management Ltd.*, No. D-101-CV-2009-1189 ("*Austin*"), named 74 defendants, (again, most of whom have never been served), but does not name Broidy or Markstone. **[RP 5640-5641, FOF 17]** *Austin* focuses primarily on alleged fraud in connection with hedge funds linked to investments involving Bernard Madoff, but also generally alleges pay-to-play at both NMERB and NMSIC. **[RP 5640-5641, FOF 17]**

Foy, who formerly worked at NMERB, has denied under oath that he has any personal knowledge of any pay-to-play at NMSIC. **[RP 5641-5642, FOF 19-20]** All of the allegations in Appellants' *qui tam* complaints about pay-to-play at NMSIC , therefore, were matters of public knowledge. Indeed, Appellants attached a chart of third-party marketers prepared by NMSIC in April 2009 as an

exhibit to the Corrected First Amended Complaint Under the Fraud Against Taxpayers Act they filed in *Austin* on June 16, 2009. **[RP 401-411]**

On April 28, 2010, Judge Pfeffer entered an order of dismissal in *Vanderbilt,* ruling that application of FATA to conduct predating FATA's enactment violated the *Ex Post Facto* Clauses in the state and federal Constitutions. On July 8, 2011, Judge Pope entered an order of dismissal in *Austin* similar to that entered in *Vanderbilt.* The Court of Appeals granted interlocutory review of the dismissal in *Austin* and affirmed, a decision that until recently was *sub judice* on certiorari before the Supreme Court. **[RP 5643, FOF 22]** The interlocutory appeal had triggered a stay of the *Austin* case which is now no longer applicable. On June 25, 2015, the New Mexico Supreme Court rendered its decision in *State ex rel. Foy v. Austin Capital Mgmt., Ltd.,* , 2015-NMSC-____ (No. 34,013, June 25, 2015) reversing the Court of Appeals. The decision from the Supreme Court does not directly affect the State's enforcement plan because the State previously decided not to bring FATA claims in this action.

3. The State's Enforcement Program.

In 2010, the NMSIC and the NMAGO began implementation of the State's own enforcement plan to obtain recoveries from corruption of the NMSIC's investment process. **[RP 5643-5644, FOF 23]** As the District Court found, the plan, among its other features: (i) reflects the determination that pay-to-play claims

would be more effectively advanced under the New Mexico Securities Act and the common law than under FATA, even if FATA could be retroactively applied **[RP 5643-5644, FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 10])]**; and (ii) initially targets individuals such as Settling Defendants with the aim of building evidence against larger targets, particularly investment entities and investment fund managers to be subsequently pursued. **[RP 5643-5644 FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 11])]**

As part of its enforcement plan, the NMSIC conducted a thorough pay-to-play investigation, including review of nearly 3,000,000 pages of documents (including investigative files from the Securities and Exchange Commission), review of substantial additional electronic files, and nearly two-dozen interviews. **[RP 5647, FOF 35]**

On May 6, 2011, to avoid claim-splitting bars to litigation, to pursue stronger claims, and to streamline its enforcement program, the State moved to dismiss only those portions of the *Austin* and *Vanderbilt qui tam* suits that related to pay-to-play at the NMSIC. **[RP 5644, FOF 24-25]** The State's motions did not seek dismissal of claims asserted on behalf of the NMERB, nor claims of direct fraud on NMSIC, such as the claims regarding nondisclosure of risks associated with the CDOs sold by Vanderbilt Capital Advisors, LLC. **[RP 5644, FOF 25]**

The *Austin* and *Vanderbilt Qui Tam* Plaintiffs (intervening Appellants here) opposed the State's motions. **[RP 5644, FOF 25]**

On December 20, 2011, the district court in *Vanderbilt* entered an Order Granting Partial Dismissal. Judge Pfeffer expressly found and determined, among other things, that "The State of New Mexico through the Attorney General is entitled to deference on this matter pursuant to concepts of separation of powers." **[RP 5644, FOF 26]**

While Judge Pope thereafter held a hearing on the motion for partial dismissal in *Austin*, he had not rendered a decision when the Court of Appeals stayed all proceedings in the district court. **[RP 5645, FOF 27]**

Seeking relief from the stay, the State filed a motion on September 19, 2011, pursuant to Rule 12-203(E) NMRA, for a limited and partial remand that would allow the district court to decide the pending motion for partial dismissal. The Court of Appeals granted that motion over Foy's objection. *Austin*, No. 31,421, slip op. (Ct. App. Oct. 10, 2011). **[RP 5645, FOF 27]** No decision has yet been made by the district court on the motion for partial dismissal in *Austin*. **[RP 5645, FOF 28]**

In 2011, NMSIC commenced this action. **[RP 1-17]** Ultimately, claims were made against 17 defendants, many, but not all of whom, had also been named in *Vanderbilt* and *Austin*. **[RP 2829-2875]** Broidy and Markstone were not named

or identified in either *Vanderbilt* or *Austin*. This action asserts claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract and unjust enrichment in connection with pay-to-play corruption of NMSIC's investment process for alternate investments. **[RP 2829-2875]**

4. The Appellants' Role in the Instant Case.

The District Court deemed this action to be an "alternate remedy" to the *Austin* case under Section 44-9-6(H) of FATA **[RP 5665-5666, COL 7]** and held that Appellants, as *qui tam* plaintiffs, have the "same rights" with respect to this action that they would have had in *Austin* "but no greater rights." **[RP 5665, COL 7]**

Accordingly, pursuant to the rights that Section 44-9-6(H) of FATA provides to a *qui tam* plaintiff with respect to an alternate remedy proceeding initiated by the State, the District Court entered its Order granting Appellants' Motion to Intervene in this case on January 18, 2012. **[RP 1470-1471]** The District Court has consistently interpreted this right to participate to be limited to claims against parties actually named in the Intervenors' *qui tam* actions. **[7-15-13 Tr. 42:18-25, 43:3-8]** and **[6-19-14 Tr. 60:11-16]**

On April 3, 2012, as Intervenors in this action, Appellants filed a Motion to Disqualify the Attorney General based on the same alleged conflicts asserted in

Intervenor's Brief in Chief ("BIC") here. **[RP 2196-2308]**; **[BIC 48-50]**. The District Court denied the Motion on October 16, 2012. **[RP 3931-3932]**

On June 17, 2012, Intervenors filed an Expedited Motion to Order SIC Attorneys to Confer in Good Faith with Qui Tam Plaintiffs about Discovery and Other Matters. **[RP 2700-2703]** The District Court denied that motion on October 20, 2012. **[RP 3940-3941]**

On July 23, 2012, Intervenors filed a Motion to Prohibit Secret Settlements. **[RP 2906-2919]** The District Court denied that motion on January 15, 2013. **[RP 4005]**

5. The Agreement with Markstone

On June 23, 2014, NMSIC entered into a settlement agreement with Markstone that provides for a $1,000,000 settlement payment in return for dismissal of Broidy. **[RP 6023-6028]** The agreement was executed on behalf of NMSIC by Governor Susana Martinez. **[RP 6028]** Further, the agreement was submitted to the District Court by the New Mexico Attorney General in support of NMSIC's motion to voluntarily dismiss Broidy. **[RP 6020-6021]**

The settlement was approved by the NMSIC in conformity with its then in effect Recovery Litigation Settlement Policy ("Settlement Policy"), which had been voted on and adopted at an open meeting on June 26, 2012. **[RP 5647, FOF 36]**. The Settlement Policy permitted a Litigation Committee to approve

settlements and required all settlements to be subject to the Inspection of Public Records Act. **[RP 5647, FOF 36]**

On May 26, 2015, the NMSIC held a publicly-noticed meeting for which the agenda had been made publicly available. *See* Affidavit of Charles V. Wollmann, filed June 29, 2015, ("Wollmann Aff."), ¶ 5.[4] At the public portion of the May 26 meeting, and pursuant to the previously published agenda, NMSIC unanimously adopted the May 2015 Amended Recovery Litigation Settlement Policy ("Amended Settlement Policy"). **[Wollmann Aff. ¶ 7]** Under the Amended Settlement Policy, the NMSIC withdrew its delegation of authority to the Litigation Committee and established that "all settlements shall be voted on in open, public session by the SIC." **[Wollmann Affidavit ¶ 7]**

During the open portion of the May 26, 2015 NMSIC meeting, the full NMSIC approved and ratified the settlement agreement entered into with respect to Broidy in this case. **[Wollmann Affidavit ¶ 8]**

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[4] The Wollmann Aff. was filed with this Court to address new facts mooting certain issues on appeal. *See Hamman v. Clayton Mun. Sch. Dist. No. 1,* 1964-NMSC-182, ¶ 6, 74 N.M. 428, 394 P.2d 273 ("The facts rendering the case moot do not necessarily have to appear from the record, but may be proved by extrinsic evidence, such as here, by affidavit and stipulation" (citation omitted)). *See also* discussion at Section V. C. below.

6. The District Court's Grant of Dismissal.

To facilitate settlements, NMSIC proposed, and the District Court adopted, over Intervenors' repeated objections, an "early settlement" phase during which only discovery essential to settlement discussions would be permitted. **[RP 5645, FOF 29]**

In a September 1, 2013 Order ("Dismissal Procedure Order"), **[RP 4358-4362]** addressing the first group of defendants as to whom NMSIC sought voluntary dismissal, the District Court held:

> The FATA scheme for bringing actions preserves the State's prosecutorial control over actions brought on its behalf. Although FATA allows private parties to initiate and retain an interest in the recovery [on] the State's claims, FATA also preserves the State's ultimate discretion to determine the ultimate nature of the State's prosecution of the FATA claims, including whether to dismiss them. **[RP 4361]**

This holding is equally applicable here.

In the Dismissal Procedure Order the District Court also set forth the procedure it would use to evaluate subsequent settlements and related voluntary dismissals. **[RP 4359-4360]** The Dismissal Procedure Order provided Intervenors with the right to object only to those settlements "with a Defendant who is also a named defendant in either [the *Austin* or *Vanderbilt qui tam* cases]." **[RP 4359]** The Dismissal Procedure Order did not provide any procedure for Intervenors to

object to NMSIC's settlements with defendants like Broidy who are not named defendants in either *Austin* or *Vanderbilt*. **[RP 4358-4362]**

On July 21, 2014, the State filed it Expedited Motion for Voluntary Dismissal of Defendant Elliot Broidy, indicating that the one million dollar settlement was being held in a suspense fund pending Broidy's dismissal. **[RP 6020]** The Motion indicated that Broidy had not been sued by Intervenors, and that they therefore lacked standing to challenge Broidy's dismissal. **[RP 6021]**

Despite having no right to object pursuant to the Dismissal Procedure Order, the Intervenors, on July 30, 2014, filed their Response and Objections to the State's motion, citing federal FCA cases in support of their contention that they had standing as *qui tam* plaintiffs with respect to Broidy, even though they did not sue Broidy in their *qui tam* case. **[RP 6035-6045]** The Intervenors' Response and Objections also stated that Intervenors "object to this proposed settlement on all of the grounds which they have previously raised in opposition to the earlier proposed settlements." **[RP 6035]** The only previously-raised objection Intervenors identified relates to discovery, an issue having nothing to do with this appeal. **[RP 6035]** Intervenors offered no new grounds to support those old objections the District Court had twice before rejected in the context of other settlements in this case.

On August 3, 2014, the District Court issued the Dismissal Order dismissing Broidy. **[RP 6046-6048]**

7. The District Court's Findings in Support of Order of Dismissal.

In its Dismissal Order, the District Court evaluated the FCA cases cited by Intervenors in support of their contention that they had standing with respect to Broidy. **[RP 6046-6048]** The District Court rejected those cases as being inapplicable and/or distinguishable. **[RP 6046-6048]**

The District Court further ruled that the other objections summarily raised by Intervenors had been previously rejected, and Intervenors had offered no reason for the District Court to change its position as to those issues. **[RP 6048]**

The District Court had previously ruled, in its Findings and Conclusions issued on February 12, 2014 in connection with the first set of settlements it approved in this case, that its first set of "findings and conclusions might provide the legal frame work for analysis of future proposed settlements." **[RP 5636]** Among the Court's February 12, 2014 Findings and Conclusions that provide the framework for the approval of the settlement at issue here are the following:

- "[B]ecause FATA vests the State with ultimate authority and control over FATA actions brought on its behalf, the settlement decisions by NMSIC warrant considerable deference"; **[RP 5682, COL 42]** and,
- Because "[t]he settlements with the Settling Defendants are part of

NMSIC's overall enforcement plan . . .[and] Courts will routinely defer to the government's overall enforcement plan," the District Court "will defer to NMSIC's enforcement plan"; **[RP 5682, COL 43]**

8. Appellants' Serial Challenges to Settlements in this Case.

On March 27, 2014, following the District Court's issuance of its Findings and Conclusions with respect to its approval of the first round of settlements in this case, Intervenors filed in the Supreme Court an Emergency Petition for Writ of Prohibition or Superintending Control and Request for Stay of All Proceedings in the District Court Pending this Court's Decision in the *Austin* retroactivity appeal ("the Petition"). **[RP 5762-5784]** The Petition raised many of the same issues raised in this appeal.

On March 30, 2014, in the absence of any stay, Judge Singleton entered her order of dismissal **[RP 5861-5862]** with respect to the first set of settlements in this case, incorporating her Findings and Conclusions and stating that the "Order is a Final Order for purposes of Rule 1-054(B)(2) NMRA." **[RP 5861]** Intervenors then filed a Motion by Qui Tam Petitioners to Modify Writ to Deal with Changed Circumstances, asking the Supreme Court to vacate, rather than prevent entry of, the Order of Dismissal and to extend the time for them to appeal. On May 1, 2014,

the Supreme Court denied the Petition. *Foy v. Singleton*, No. 34,610 (May 1, 2014). **[RP 5888-5889]**

Appellants have filed three other appeals challenging dismissals of defendants in this case. On April 28, 2014, Intervenors filed their notice of appeal in the First Appeal (Ct. App. No. 33,787) **[RP 5867-5870]** regarding the first set of settlements approved by the District Court in this case. On August 25, 2014, Intervenors filed their notice of appeal in the Second Appeal (Ct. App. No. 34,077) **[RP 6055-6059]** regarding yet another settlement approved by the District Court in this case. On February 27, 2015, Intervenors filed their notice of appeal in the Fourth Appeal (Ct. App. No. 34,570) regarding yet another set of settlements approved by the District Court in this case. This appeal differs from the First, Second, and Fourth appeals in that in this appeal the primary issue is Appellants' standing to object rather than the adequacy of a hearing or the reasonableness of a settlement.

9. The Vanderbilt Settlement.

In early 2013, NMSIC entered into a settlement with Vanderbilt Capital Advisors, LLC and its affiliates ("Vanderbilt"). **[RP 4562-4580]** Vanderbilt agreed to pay $20,000,000 to settle claims related to NMSIC's investments and $4,250,000 to settle with the ERB on its investments. **[RP 4570]**

On February 21, 2013, the NMAGO, on behalf of itself, the State, the ERB and NMSIC, filed a Motion to Approve and Enforce Settlement Agreement (the "Enforcement Motion") in *Vanderbilt*. The State asserted that the settlement was fair, adequate and reasonable under all of the circumstances and provided detailed evidentiary support for its position. **[RP 4545-4560]**

Intervenors (as *qui tam* plaintiffs in *Vanderbilt*) did not oppose the settlement and instead filed a motion to stay *Vanderbilt* until the Supreme Court rendered its decision in the *Austin* appeal. **[BIC 18]** The State argued in opposition to the stay that the State's ability to assert common law claims against Vanderbilt (unaffected by Intervenors' FATA *Ex Post Facto* problem) negated the significance of the *Austin* appeal with regard to the *Vanderbilt* settlement. **[RP 4625-4630]** The State requested a hearing on the Enforcement Motion and the motion for stay. Judge Pfeffer did not hold a hearing but, instead, issued a decision staying *Vanderbilt* on July 12, 2013, **[RP 5961-5967]** noting that the State had not initially sought dismissal of all of the *qui tam's* claims that it was seeking to settle. **[RP 5964-5966]** To date, the Vanderbilt settlement monies remain in escrow and cannot yet be invested for, or distributed to, the NMSIC trust beneficiaries.

ARGUMENT

I. STANDARD OF REVIEW

Appellants' Brief in Chief mistakenly asserts that "[t]he district court erred by dismissing the case *via summary judgment*." **[BIC 1]** (emphasis added). As the record clearly reflects, the District Court was not asked to and did not make any sort of summary judgment ruling here whatsoever. Instead, the District Court granted a motion for voluntary dismissal pursuant to Rule 1-041(A)(2) NMRA. **[RP 6020]**

The critical threshold issue is whether, before granting the dismissal, the District Court was required by FATA to provide Appellants with an opportunity to present evidence at a hearing to determine whether the settlement was fair, adequate and reasonable. That issue involves the application of FATA law to a set of undisputed facts: the *qui tams* never sued Broidy, they admit that they have no personal knowledge of anything Broidy may have done to corrupt the investment process at the NMSIC and, therefore, they have not and are unable to provide the State with any genuine, useful information about Broidy that the State lacks. If Appellants had properly raised that issue in this appeal, the standard of review would have been "whether the trial court correctly applied the law to the facts." *Rienhardt v. Kelly*, 1996-NMCA-050, ¶ 6, 121 N.M. 694, 916 P.2d 963.

While Appellants have raised other issues that might require application of other standards of review, most of those issues are simply red herrings. For example, Appellants assert that the District Court erred in deciding that the settlement was fair, adequate and reasonable. That issue is a red herring, because the District Court never made such a fairness decision. Appellants also argue that they were given insufficient discovery to present evidence at a fairness hearing. That issue is also a red herring, because there was no fairness hearing.

Of course, were those issues germane, all of the District Court's findings of fact related to them would have to be deemed conclusive, because Appellants have not sought review of a single finding made by the District Court. By asserting that "[a]ll of the questions in this appeal involve questions of statutory interpretation," **[BIC 1]** Appellants have expressly waived any challenge to the District Court's factual findings. Even had they not done so, the District Court's factual findings still remain uncontested because Appellants failed to "set forth a specific attack on any finding" as required by Rule 12-213(A)(4) NMRA.[5] All of the findings must

[5] Even so, Appellants' Brief in Chief makes countless purported conspiracy theory and *ad hominem* assertions without citation. Because those assertions are unaccompanied by any support in the record, they are merely, at best, improper arguments of counsel, not evidence, and the Court should not consider them. *See State v. Hall*, 294 P.3d 1235, ¶ 28 (S.Ct. 2012); *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145, N.M. 451, 200 P.3d 104.

therefore be "deemed conclusive." *Id.; Blea v. Fields*, 2005-NMSC-029, ¶ 22, 138 N.M. 348, 120 P. 3d 430.

II. APPELLANTS LACK STANDING TO CHALLENGE THE STATE'S DISMISSAL OF BROIDY.

What Appellants attempt through this appeal—to hijack control of the State's legal claims against Broidy—is all the more remarkable because Appellants never sued Broidy and have no standing as to the State's claims against him. Appellants' limited rights in this case derive solely from their prior *qui tam* suits, which neither named Broidy as a defendant nor identified Broidy's alleged misconduct that the State resolved through its settlement here.

Although the District Court found that Appellants lacked standing to object to the settlement with Markstone on behalf of Broidy, Appellants failed to make any legal argument regarding the issue of standing in this appeal. The issue is therefore waived. Even if they had not waived the issue, the law makes clear that *qui tam* plaintiffs like Appellants have no rights as to defendants they never sued. As a consequence, this Court need go no further in its review of this appeal. Without standing, Appellants cannot properly raise any of their other objections to the dismissal of Broidy.

A. Appellants Waived the Issue of Standing for Purposes of this Appeal

Appellants failed in this appeal to even challenge the threshold issue decided by the District Court with respect to Broidy's dismissal: that Appellants, as Intervenors below, lack standing to object to the State's dismissal of Broidy. Because Intervenors had never named Broidy (or, for that matter, Markstone) in their prior *qui tam* suits, the District Court correctly held that Intervenors had "failed to make a showing" that they had standing to address matters concerning Broidy in this case. **[RP 6048]** By failing to address the District Court's ruling on standing in their Brief in Chief, Appellants have waived the issue for purposes of this appeal. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, 1260 (holding that party "waived this argument by failing to raise it in his brief in chief").

This waiver is not cured by Appellants' "Statement of Proceedings" where they argue that they, in effect, included Broidy as a "Doe" defendant in the *Austin* complaint, because he was "included in the list of investments [published by NMSIC in April 2009 and attached as an exhibit to the complaint] where kickbacks *might* have occurred." **[BIC 11]** (emphasis added). Broidy was not "included in the list." Neither his name nor Carr's appears anywhere on the exhibit. **[RP 401-411]** Moreover, even if Broidy had been listed as one of hundreds of potential wrongdoers, his inclusion would not have been the equivalent of naming him personally. The underlying premise of the *qui tam* suit—that a *qui tam* plaintiff

earns his or her rights to participate in and share in the recovery from the State's claims by identifying and/or pursuing fraud on the State's behalf—would be utterly meaningless if one could earn those rights simply by naming countless "Doe" defendants in association with generalized allegations of misconduct. Due to the Appellants' waiver of the issue of standing, the District Court's ruling on the matter is conclusive.

B. Appellants Lack Standing with Respect to Broidy.

Even if Appellants did not waive the issue of standing, there is simply no support for the proposition that Intervenors have standing (or any rights) with respect to Broidy, a defendant whom the State sued but the Intervenors—in their prior *qui tam* suits—did not.

In the District Court's Findings and Conclusions filed on February 12, 2014 with respect to the first round of settlements in this case, the District Court held that FATA Section 44-9-6(H) does not give a *qui tam* plaintiff any greater rights in a so-called "related action" filed by the State than he would have had in his original *qui tam* action. **[RP 5665-5666, COL 7]** Intervenors would have had no rights with respect to Broidy and Markstone in either of their FATA actions, because neither Broidy nor Markstone is a party to either of those actions. Therefore, Intervenors have no right to object to a settlement with Broidy and Markstone.

In their Response and Objections to the State's Motion for Voluntary Dismissal of Broidy, Intervenors cited five cases under the federal False Claims Act ("FCA") to suggest that they in fact have standing with respect to Broidy.[6] **[RP 6037]** *citing United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634 (6th Cir. 2003); *United States ex rel.Roberts v. Accenture, LLP*, 707 F.3d 1011 (8th Cir. 2013); *United States ex rel. Rille v. PricewaterhouseCoopers LLP*, 748 F.3d 818 (8th Cir. 2014); *United States ex rel. Barajas v. United States*, 258 F.3d 1004 (9th Cir. 2001); *United States ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323 (M.D. Fla. 2001).

None of the five FCA cases cited by Intervenors provides a basis to reverse the District Court on standing. All five cases are distinguishable, principally because they all involved settlements with parties the qui tam plaintiffs *had actually sued.*

Only one of the cases, *United States ex rel. Rille v. PricewaterhouseCoopers LLP*, 748 F.3d 818 (8th Cir. 2014), also allowed relators to share in the proceeds of a settlement with a party the relators had not sued, but the circumstances related to that settlement are fundamentally different than the circumstances related to the

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[6] Appellants' reliance on FCA cases—misplaced as it is—is nonetheless remarkable given Appellants' insistence that it is erroneous to rely on federal case law in interpreting FATA because of the "manifest differences between the statutes." **[BIC 34]**

settlement relating to Broidy.

The basis for the *Rille* decision was as follows: "where the government elects to intervene in a relator's action and receives settlement proceeds conditioned upon the dismissal of the relator's action with prejudice, we conclude as a matter of law that [all of] the settlement funds constitute 'proceeds of the action.'" *Id.* at 824. The court noted that the settlement amount paid by Comstor, the party the relators had not sued, "arose out of the action the relators originally brought" in that the relators identified Comstor's fraudulent practices **before** the government intervened. *Id.* at 825. Through discovery they conducted on their own in the several years they litigated the case by themselves, the relators uncovered evidence of Comstor's wrongdoing. *Id.* They turned the evidence over to the government. *Id.* The government intervened and "took advantage of relators' substantial efforts." *Id.* The government then entered into a settlement with Comstor that "involved the fraudulent practices first identified by the relators." *Id.* The court found that "[t]he government's intervention robbed the relators of the ability to further refine their complaint by adding specific allegations against Comstor." *Id.* As a matter of policy, the court said, all that should be required for a relator to share in the proceeds of a settlement is that he be "an original source of the information on which the fraud allegations are based." *Id.*

This case is distinguishable from the situation in *Rille* and, as the District Court correctly found, "Intervenors failed to make a showing that their case is comparable." **[RP 6048]** The relators in *Rille* were the original source of the information about the claims against Comstor; Intervenors were not the original source of any information about the claims against Broidy, Markstone or anyone else. *See* **[RP 5670, COL 17]** In *Rille*, the relators uncovered evidence against Comstor and provided it to the government; Intervenors have uncovered nothing about Broidy or Markstone and have provided nothing to the State. In *Rille*, the government not only intervened in the relators' action, but also "simply adopted the relators' complaint upon intervening," 748 F.3d at 823; here, the State did not intervene in either FATA case, but instead moved to dismiss the claims in both actions having to do with pay-to-play at NMSIC. Under these circumstances, Intervenors have done nothing to earn a share of the settlement with Markstone and should not be given standing to object to Broidy's dismissal.[7]

Rille provides no basis for holding that FATA gives Appellants the right to share in the proceeds of a settlement—and, derivatively, the right to object to a settlement—with a party they did not sue, when the State does not intervene in the

[7] In his dissenting opinion in *Rille*, Judge Colloton argues persuasively that allowing a relator to share in the proceeds of a settlement with a party against which he did not assert a claim is inconsistent with the text, structure and purpose of the FCA. *Id.* at 826-27.

FATA action, seeks to dismiss the FATA claims, uncovers securities law and common law claims against the party, and effects a settlement with no help whatsoever from Appellants.

Presumably, if Appellants are successful in jettisoning the State's million dollar settlement, they will seek to amend their complaint in *Austin* to include claims against Broidy and Markstone and copy the allegations of wrongdoing NMSIC has made in this action. **[BIC 11]** ("Foy will amend his complaint [to name Broidy and Markstone] after the stay is lifted" and the stay is now lifted.) In that event, Appellants would be just like the qui tam plaintiff in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-54 (1943), who, with no personal knowledge of any wrongdoing by the defendant, was able to bring an FCA action and obtain a reward simply by making allegations he discovered in a criminal indictment brought by the government. As the New Mexico Supreme Court recently explained, after the *Hess* case, Congress amended the FCA to prevent such actions, and "[t]he U.S. Supreme Court has since referred to the qui tam action in *Hess* as a 'quintessential parasitic suit.'" *Austin,* 2015-NMSC- ____, ¶ 13(citation omitted).

The Supreme Court has interpreted FATA to include the same "overarching concern" to "prohibit 'parasitic' qui tam plaintiffs" as is found in the amended

FCA. *Id.* ¶ 15. It may be that, by virtue of his position as Chief Investment Officer of the ERB, Frank Foy had personal knowledge to support his allegations about the non-disclosure of risk by Austin Capital in connection with the ERB's investment in Austin Capital's fund. If so, then the Supreme Court would be correct that *Austin Capital* was not a wholly parasitic suit. *Id.* ¶ 18 (Foy was not "simply repeating someone else's allegations," because, by virtue of his position at the ERB, he may have had "'genuine, useful information that the government lacks.'") Inclusion of Broidy and Markstone as defendants in the now-consolidated *qui tam* action, however, would squarely meet the definition of "parasitic" adopted by the Supreme Court: Foy has sworn he has no information whatsoever about pay-to-play at NMSIC. **[RP 5641-5642, FOF 19-20]** Foy certainly has no genuine, useful knowledge that the State lacks after its extensive investigation and discovery. In making allegations against Markstone and Broidy, therefore, Foy would simply be repeating NMSIC's allegations. Like the FCA, FATA abhors parasites. Therefore, the Dismissal Order should be affirmed.

III. THE DISTRICT COURT NEITHER EXCEEDED ITS JURISDICTION NOR VIOLATED THE STAY.

Appellants' claim that the District Court "had no jurisdiction over the claims in the *Austin* case," and yet "tried the *Austin* case *in abstentia*" **[BIC 22-23]** is demonstrably false. With respect to Broidy, of course, this argument is wholly

misplaced and underscores the fact that Appellants insufficiently edited the brief they filed in their prior two appeals before filing it here.

The District Court, in allowing the settlement and dismissal with respect to Broidy, did not "tr[y] the *Austin* case *in abstentia*" for the simple reason that there were no claims against Broidy in the *Austin* case.

Appellants also say that the District Court violated the stay imposed in *Austin* by operation of Rule 12-203(E) NMRA because of the interlocutory appeal on FATA's retroactivity. **[BIC 23-24]** The stay does not apply to this case and in any event, on September 19, 2011, the State moved this Court for a partial lifting of the stay in the *Austin* interlocutory appeal. The State did so for the express purpose of obtaining dismissal of NMSIC pay-to-play claims in the *Austin* case, thereby facilitating pursuit of its pay-to-play claims here. **[RP 5645, FOF 27]** Over Intervenors' objections, this Court granted the State's motion, partially lifting the stay to allow resolution of the dismissal of Intervenors' NMSIC pay-to-play claims in *Austin* (Ct. App. No. 31,421, Oct 10, 2011). **[RP 5645, FOF 27]** The District Court's approval of the settlements here, therefore, in no way violated the letter or spirit of the stay, particularly as it was modified by the State's motion.

IV. THE ORDER OF DISMISSAL IS A FINAL APPEALABLE ORDER.

Appellants also argue, without citation to authority, that the District Court's Order of Dismissal is not a final appealable order because it does not adjudicate

whether Intervenors are entitled to a share of the settlement proceeds and attorneys' fees. **[BIC 38-40]** An otherwise final order is not, however, rendered non-final for purposes of appeal where issues remain as to such things as an award of costs or attorneys' fees for services rendered in the litigation that is the subject of the appeal. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶ 11-29, 113 N.M. 231, 824 P.2d 1033.

Conversely, the District Court's October 16, 2012, Order Denying Intervenors' Motion to Disqualify the Attorney General, which Appellants apparently claim was erroneous **[BIC 48-50]**, is not a final appealable order, and, if it were, the time to appeal expired long ago.

V. THE SETTLEMENT IS NOT PROCEDURALLY DEFECTIVE.

In its rulings with respect to the first set of settlements it approved in this case, the District Court correctly, and expressly, rejected Intervenors' contentions that the settlements were conducted in a manner that violated the Inspection of Public Records Act, NMSA 1978, § 14-2-1 *et seq.* ("IPRA") and the Open Meetings Act, 1978 NMSA § 10-15-1 *et seq.* ("OMA"). This ruling has equal force here since the settlement at issue in this case was approved using the same process as the first group of settlements. Intervenors merely incorporated by reference their earlier objections **[RP 6035]** and have made on appeal the exact same challenges to that process here as were made on the First Appeal.

In any event, without conceding that Appellants' (or Amici's in the First Appeal) assertions have merit, and to eliminate any question about its settlement process, NMSIC has cured any alleged deficiency under OMA and IPRA by again ratifying and approving the settlements. These issues have therefore been rendered moot.

A. Appellants Fail to Support Their Claim That NMSIC Violated the Inspection of Public Records Act.

Appellants make the unsupported assertion that the settlement relevant to this case, i.e., the Markstone settlement, violated IPRA. **[BIC 40-43]** The District Court has previously and soundly rejected this argument as it applied to other settlements. **[RP 5664, COL 4]** There is no evidence of any attempt to shield the Markstone settlement from IPRA. Moreover, the Markstone settlement agreement has been publicly filed in this action. **[RP 6023-6029]** Appellants have cited nothing in the record to suggest that the Markstone settlement has not been properly made available according to IPRA. Accordingly, Appellants' claim that the settlement agreement somehow violated IPRA should be rejected. *See In re Estate of Heeter,* 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("[t]his [C]ourt will not search the record to find evidence to support an appellant's claims").

B. The District Court Correctly Dismissed Appellants Unsupported Assertion That NMSIC's Approval of the Markstone Settlement Agreement Violated the Open Meetings Act.

The District Court found that settlements were approved pursuant to the Recovery Litigation Settlement Policy ("Settlement Policy") adopted at a public meeting of the NMSIC on June 26, 2012. **[RP 5664, COL 3]** The Settlement Policy formed a Litigation Committee to "actively participate in settlement negotiations, as appropriate, with the authority of the [NMSIC] for settlement resolution and related decisions."[8] **[RP 5968]**

As the District Court correctly concluded, the actions of the Litigation Committee are the very type of attorney-client privileged litigation decision-making exempted by OMA. **[RP 5663, COL 3]** *citing Bd. of Cnty. Comm'rs v. Ogden*, 1994-NMCA-010, ¶ 17, 117 N.M. 181, 870 P.2d 143, NMSA 1978 § 10-

[8] The District Court found that appellants had "implicitly conceded that the Council could properly delegate settlement authority to a committee of its members consistent with the [OMA] but maintained that the delegation had to be publicly voted on and recorded." **[RP 5664, COL 3]** As it is undisputed that the delegation, via the Settlement Policy, was publicly voted on and recorded, the Litigation Committee acted within it proper authority. Accordingly, the argument made by Amici in the First Appeal that the Litigation Committee "lacked lawful authority to settle any of the investment recovery lawsuits" **[Amici 10]** has not been preserved for appeal and should not be considered. *Crutchfield v. N.M. Dep't of Taxation & Revenue,* 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273.

15-1(H)(7)(2013) (the OMA "does not require that a decision regarding litigation be made in an open meeting").[9]

In addition, conducting litigation and settling matters on behalf of the State are functions vested in the Attorney General ("AG"). *See* NMSA 1978: § 8-5-2 (duties of the AG); § 36-1-19 (making the AG and district attorneys the exclusive representatives of the state and counties, with express exceptions not relevant here); § 26-1-22 (giving the AG authority to settle any matter involving the state). The AG delegated to NMSIC his litigation and settlement authority in this case.

The Litigation Committee's review and approval of the settlement in this case—in turn approved by the AG via signed public court filings **[RP 6021]**—therefore constituted an exercise of the Attorney General's authority to settle cases. As a consequence, the Litigation Committee was not required to follow the technical requirements of OMA. *See, e.g., Open Meetings Act Compliance Guide,* at 9 (8th Edition 2015) ("Of course, where the chief policymaking official of an

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[9] Amici in the First Appeal suggest that the Litigation Committee was required to vote in open session, even though the preceding discussion could be held in closed session, because the *Ogden* decision has been effectively superseded by *Bd. of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36, *overruled on other grounds, Republican Party v. N.M. Taxation & Revenue Dep't,* 2012-NMSC-026, 283 P.3d 853. In fact, the *Sun-News* decision relates to an IPRA request, not a claimed violation of the OMA. The holding of *Sun-News* is that settlement agreements must be produced in response to an IPRA request, which the NMSIC does not dispute.

agency is a single individual the [OMA] does not apply because the official is not a public body, complete decision making authority is vested solely in the official, and no deliberation or vote is necessary for effective action").

Even if the Litigation Committee were subject to OMA, the processes followed here satisfied OMA's purposes and therefore did not violate OMA. *See Parkview Cmty. Ditch Ass'n v. Peper,* 2014-NMCA-049, ¶ 13, 323 P.3d 939 ("[u]nder the substantial compliance standard, 'when the [OMA] has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute,' no violation has occurred" (citing *Guitierrez v. Albuquerque,* 1981-NMSC-061 ¶ 14, 96 N.M. 398, 631 P.2d 304)).

Notwithstanding the applicability of OMA's attorney-client exception, Amici in the First Appeal (not here) argue that OMA, nonetheless, required NMSIC to provide notice in advance of any Litigation Committee meeting together with an agenda and limited meeting minutes. **[Amici 18]** The benefit of such actions, in theory, would be to confirm that the meetings were properly closed and that only privileged matters were discussed. **[Amici 20]** In this case, however, the subject of these meetings has been outlined in open court, and there is no suggestion that anything improper was discussed. Since the purpose of OMA's requirements has been satisfied, these arguments should not be allowed to invalidate the settlement agreements. *See Parkview* ¶ 16 (where the purpose of the

procedure was not relevant in context, action without following the technical procedures would not be invalidated). Similarly, even if the failure of the Litigation Committee to vote in an open session were a technical violation of the OMA, it would not be a basis to invalidate the actions of the Litigation Committee. Presumably, the purpose of voting in open session is accountability, but in the case of the Litigation Committee all actions were taken only by unanimous consent. **[RP 5664, COL 3]** Accordingly, there would be no additional information provided if the Litigation Committee had voted in open session to approve the settlement.

C. Any Conceivable Violation Has Been Cured by The NMSIC, Rendering These Issues Moot.

To the extent that NMSIC's approval of the settlement agreement had any procedural deficiencies, they have been cured by NMSIC's subsequent actions. *See Kleinberg v. Bd. Of Educ.,* 1988-NMCA-014,¶ 30, 107 N.M. 38, 751 P.2d 722, ("procedural defects in the Open Meetings Act may be cured by taking prompt corrective action"). Specifically, at a duly noticed public meeting held May 26, 2015, a majority of a quorum of the NMSIC voted in open session to approve again the settlements as to the two Settling Defendants at issue in this appeal, **[Wollmann Aff., ¶ 8]** [10] thus mooting the issue of the procedural sufficiency of

[10] The relevant facts in the Wollman Aff. may be judicially noticed. *See* Rule 11-201 NMRA (2012), NM Rules of Evidence, Art. 2 § B ("The court may

the Markstone settlement agreement. Further, the Council has amended its Settlement Policy so all settlements must be considered and approved by the Council as a whole.[11] **[*Id.*, ¶ 7]**

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judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the court's territorial jurisdiction, [or] (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). The ratification of this settlement can be confirmed by reference to the minutes of this meeting available on the NMSIC's website. http://www.sic.state.nm.us/meeting-materials.aspx (Meeting Minutes for May 26, 2015 at page 3); *see also* Dan Boyd, *SIC Votes for Transparency on Settlement Agreements*, Albuquerque Journal, May 27, 2015, http://www.abqjournal.com/590590/news/sic-votes-for-transparency-on-settlement-deals.html ("The SIC then voted to ratify nearly a dozen settlements. . . . All those settlements had been previously approved by the SIC's litigation committee and publicly divulged, in some cases after formal records requests were filed"); *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003,¶ 9, n. 2, 121 N.M. 205, 910 P.2d 281 (Supreme Court taking judicial notice of "recent newspaper references").

[11] *See also* Justin Horwath, *Investment Council Strips Subcommitee of Authority over Settlements*, Santa Fe New Mexican, May 26, 2015 http://www.santafenewmexican.com/news/local_news/investment-council-strips-subcommittee-of-authority-over-settlements/article_eb102506-d1b8-5456-b20d-42850f6d6501.html ("a foundation board member who wrote a legal brief on the issue, called the council's policy change a 'very good move for openness' that will allow the public to know how the full 11-member body votes on settlement agreements"); Dan Boyd, *SIC Votes for Transparency on Settlement Agreements*, Albuquerque Journal, May 27, 2015, http://www.abqjournal.com/590590/news/sic-votes-for-transparency-on-settlement-deals.html ("Daniel Yohalem, a Santa Fe attorney who is representing FOG and the press association, called the revised SIC settlement policy a 'complete victory' for the state's Open Meetings Act"); May 26, 2015 NMSIC Meeting Minutes, available at http://www.sic.state.nm.us/meeting-materials.aspx (voting in open session of publicly-notice meeting to approve/ratify all settlements, and amending litigation committee policy).

The NMSIC's judicially-noticeable actions address all purported OMA violations identified by Appellants and comport with the actions Amici requested in the First Appeal. *See* Amici Brief at 10 (stating, "[the Settlement Agreements] are without effect and must be ratified or rejected by vote of a majority of a quorum of the SIC in an open public meeting"). Because there can no longer be any doubt that the alleged technical deficiencies in the settlements have been resolved, this Court should affirm the District Court's decision without reaching the issues raised regarding the OMA. *See Palenick v. City of Rio Rancho,* 2013-NMSC-029, ¶16, 306 P.3d 447 (where plaintiff had alleged that his termination was ineffective due to violations in the OMA the court held, "because we conclude that [plaintiff's] actions amounted to waiver by estoppel we need not address whether the OMA was violated in this case, or the associated issues").

CONCLUSION

For the foregoing reasons, NMSIC respectfully requests this Court affirm the decision of the District Court. The actions of Appellants hurt the State and jeopardize prudent settlement payments and cooperation that strongly benefit the State.

Dated: June 29, 2015

Respectfully submitted,

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